



Agenda Date: 2/05/03
Agenda Item: 3 I

STATE OF NEW JERSEY

Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.bpu.state.nj.us

CABLE TELEVISION

IN THE MATTER OF AN INVESTIGATION INTO
THE OPERATIONS OF RCN OF NEW JERSEY

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ORDER ACCEPTING
ADMINISTRATIVE CONSENT
AGREEMENT

DOCKET NO. CX01070460

(SERVICE LIST ATTACHED)

BY THE BOARD¹:

RCN of New Jersey ("RCN"), a cable television system operator with its principal office located at 105 Carnegie Center, Princeton, New Jersey 08540-6215, is a franchised cable television operator, which provides cable television services to approximately 81,000 New Jersey subscribers in 31 communities throughout Hunterdon, Mercer, Morris and Somerset Counties.

Background and Discussion

The Board, conducted service hearings in the Borough of Princeton on September 6, 2001 and in the Township of Clinton on September 10, 2001, and received the comments of dozens of witnesses concerning, among other things, the adequacy of RCN's cable television operations and customer service. During the course of those hearings, Mr. John Pitts, a senior management representative of RCN appeared to answer the concerns expressed by the company's subscribers, and to deliver a statement on behalf of the RCN outlining certain commitments concerning network modernization and customer service improvements. As part of its statement, RCN committed to, among other things, invest approximately \$75 million to complete a rebuild of cable television facilities serving the 31 municipalities in its Central New Jersey system over a three-year period. Mr. Pitts estimated that approximately \$25 million of that amount had already been expended by RCN upgrading its Central New Jersey cable systems. The company outlined certain benefits of said rebuild that would inure to its customers, including, two-way high-speed cable modem service, access to more than 200 high-quality digital cable channels and 45 CD-quality music channels, increased network reliability, and improved picture quality. Mr. Pitts, on behalf of RCN pledged to do a better job of keeping local

¹ Commissioner Carol J. Murphy did not participate in the deliberation or the vote on this matter.

officials, its subscribers and all interested parties informed of the developments and its progress in their area, and to respond more quickly and effectively to other service issues that may arise. The company further pledged to provide each community and governing authority regular updates and progress reports regarding its rebuild and service initiatives.

As a result of the aforesaid hearings, the Board found it appropriate to conduct an investigation of RCN's operations in New Jersey. The investigation focused first on telephone performance and the corrective measures necessary to address the numerous complaints heard concerning subscriber difficulty in contacting the company by telephone. Therefore, as an initial measure, the Board directed RCN by Order dated September 26, 2001 to produce certain records and institute corrective measures concerning its telephone service operations, as well as a detailed plan of its commitment to upgrade and/or rebuild the thirty-one municipalities it serves by October 4, 2001.

On October 5, 2001, RCN filed a response that was deemed deficient by the Office of Cable Television ("Office") Staff. The plan failed to identify twenty-four of the thirty-one municipalities RCN serves and had committed to upgrade. The plan named a few municipalities in passing but without sufficient detail. On October 15, 2001, RCN was requested to submit a detailed response by October 22, 2001 in compliance with the Board's Order. On that date, RCN submitted a supplement to its October 5, 2001 filing, which contained additional information on the rebuild commitment, and sought to have the information contained therein deemed confidential. Specifically, RCN prepared a schedule as part of its submission which described each phase of work in Hunterdon, Morris and Mercer counties, including municipalities in each phase, start and completion dates, estimates for the cost of construction, total miles of system plant, number of homes passed, projected subscribers and capital expenditures. RCN averred that because the schedule submitted with the filing (attached as Exhibit "A" to the certification of Philip J. Passanante, corporate counsel of RCN) contained detailed information concerning its business plan, it should be deemed proprietary and maintained as confidential by the Board. Unredacted versions of the filing containing the alleged proprietary information were filed directly with the Office Staff for review.

After careful review, the Board by Order dated December 19, 2001, denied RCN's motion finding that RCN had not demonstrated that the schedule at issue contained legitimate proprietary and confidential information worthy of protection from public disclosure, and that RCN had further failed to show good cause that disclosure of the information within the schedule could harm its legitimate business and competitive interests and result in financial injury if it fell into the hands of actual or potential competitors. The Board further noted that it had Ordered RCN in its October 4, 2001 Order to file a detailed plan regarding the rebuild commitment and further directed that copies be made available to the mayors of each municipality. We further noted that RCN had failed to file for reconsideration of this directive within the timeframe required by law and that certain of the information for which RCN sought protection, i.e., information regarding the number of subscribers, number of franchised municipalities and total plant miles are items contained within other documents, such as the Board's Cable Facts, published by the Office of Cable Television annually. Accordingly, such information was already in the public domain. The Board also found RCN's arguments weak concerning the release of its financial calculations relating to the capital expenditures to complete the rebuild since it had already voluntarily divulged to the public and the Board its commitment to spend approximately \$75 million to upgrade and/or rebuild the facilities in the thirty-one municipalities it serves, and that non-disclosure of the financial information would infringe on municipal review.

On January 10, 2002, the Board received a further motion from RCN seeking Partial Reconsideration of the December 19, 2001 Order. In particular, RCN requested reconsideration of the specific information of each community relating to capital expenditures, either in place, in inventory or necessary to complete, as well as the number of cable modem subscribers by community. In support of its motion, RCN cited, *inter alia*, that petitions for Certificates of Approval to overbuild were either approved or pending for at least three of the communities on its rebuild schedule, and maintained that the actual dollar amount spent and pending, listed by each community, would give a competitor valuable insight into a plan for an overbuild. RCN also claimed that knowledge of its projections of customers for the competitive modem service in each community it serves would provide a road map for a competitor to plan a marketing strategy. Again, after careful review of all of the evidence submitted by RCN, we determined that RCN's arguments for confidentiality with respect to the financial information appeared weak based on the past voluntary disclosures noted above. We found that RCN had already divulged the specific information contained in the columns in its schedule concerning the capital expenditures spent or pending. We noted that if one knows the total capital expenditure and what had been expended to date, one can readily determine the additional capital expenditure required to complete the project, and calculate the figures in the capital expenditure columns that RCN sought to shield. We found that disclosure of the information would not harm RCN, since, among other things, the per mile costs of a rebuild are generally known within the cable television industry, and once a competitor has knowledge of the actual plant miles within a particular municipality, a cost approximation can be made. We did, however, grant RCN's motion in part, and ordered that the column in RCN's schedule relating to cable modem subscribers be redacted, since that information does not relate to the costs and status of the upgrade, its release could be potentially harmful to RCN and given its non-relation to the rebuild costs, there was no legitimate reasons to permit its disclosure.

On November 13, 2001, RCN submitted additional documents to the Office Staff pertaining to its business plans and financial reporting, and again by motion filed December 18, 2001, sought protective treatment for its submissions. The submissions included specific information concerning customer service call center staffing and call volumes, telephone trunk lines and traffic, cost allocation and financial information relating to the company's operations the disclosure of which we deemed to be potentially harmful to RCN in our Order of June 5, 2002. Other information in the submissions regarding programming, rates and franchise renewal activity, readily obtainable from documents in the public domain, was denied protective treatment.

Throughout this time, OCTV Staff continued to pursue information found to be lacking in its various submissions, but necessary to comply with the Board's October 4, 2001 Order. On May 15, 2002, after several unsuccessful attempts by Office Staff to obtain certain additional financial, technical and system management information, absent in RCN's prior submissions, the Board issued a Subpoena Duces Tecum and Subpoena Ad Testificandum which required RCN, RCN Corporation (the parent of RCN Telecom Services) and several named principles and employees to appear at the offices of the Board for a deposition on June 17, 2002 and to supply the Office with financial, technical and system management information concerning RCN's New Jersey cable systems. On June 17, 2002, RCN appeared with only three of the ten named persons compelled to appear. In addition, the document submissions made prior to their attendance were insufficiently responsive to the subpoena terms.

Based on the foregoing, at its August 7, 2002 agenda meeting the Board authorized the Attorney General's Office to file a motion in Superior Court, Chancery Division on its behalf to

enforce the Subpoena. This action spurred RCN to engage in further efforts to comply with the terms of the Subpoena. A second Deposition was held on August 12, 2002, in which three high-level officers of the RCN parent company gave testimony. Since then, RCN has provided eight boxes of documents pertaining to the infrastructure upgrade rebuild originally pledged by RCN at the Board's fall 2001 service hearings.

On August 27, 2002 the Office and its counsel were informed that RCN had entered into an agreement with Spectrum Equity Investors ("Spectrum") and cable entrepreneur Steve Simmons jointly incorporated as Patriot Media and Communications CNJ, LLC. ("Patriot") for the purchase of RCN's Central New Jersey cable television system. A joint petition governing the sale was thereafter filed on September 11, 2002. According to the sale agreement, Patriot will acquire RCN's Central New Jersey assets for \$245 million in cash, and Mr. Simmons will serve as the company's President and CEO. RCN stated to the Office and in its press release that Patriot is aware of and will assume all of RCN's current obligations to the Board regarding the pledged infrastructure rebuild. This commitment has been reiterated by Patriot in several subsequent meetings and is included as part of the joint petition for transfer.

In an effort to resolve the issues that gave rise to the Board's investigation, the Office and its counsel have conducted negotiations with RCN to settle the service quality matter and customer service issues by means of an administrative consent agreement. A final agreement has been reached which obligates RCN and, any subsequent successor including Patriot, to continue its rebuild according to the tight schedule originally promised by RCN in 2001. All phases of the rebuild must be completed by December 31, 2004. The new system will operate at a minimum capacity of 750 MHz, and will be sufficient to provide two-way high-speed cable modem service, high-quality digital cable channels and CD-quality music channels for its subscribers.

The agreement also includes both a monetary and injunctive penalty imposed on the company for its prior rebuild delays and its failure to comply with the Board's subpoena in a timely manner. RCN will deliver an in-kind benefit to every current customer in its Central New Jersey system in the aggregate amount of \$1.2 million. To this end, under the terms of the agreement, each individual customer will receive a one-time bill credit of approximately \$15.00. RCN will also, under the agreement, tender the sum of \$50,000 payable to the Department of Education, State of New Jersey, payable July 10, 2003 to support educational programs, consistent with appropriate language in the New Jersey state budget permitting both the receipt and expenditures of these funds.

In addition to the above-mentioned terms, RCN has agreed to provide a "hot-line" on which customers may inquire as to the status of the rebuild. It has also agreed to expand its customer service and technical training programs and provide the Office with details regarding the number of customer complaints the company receives.

The Office recommends acceptance of this Consent Agreement based upon the aforementioned commitments. The Office will monitor and enforce RCN and Patriot's compliance with its terms.

The Board has reviewed the matter and recommendation of the Office, and HEREBY FINDS it to be reasonable. Therefore, the Board HEREBY ACCEPTS the Consent Agreement and incorporates its terms as if fully set forth herein subject to the following provisions, conditions and/or limitations:

1. RCN shall tender \$50,000.00 to the Department of Education, State of New Jersey, payable July 10, 2003 to support educational programs, consistent with appropriate language in the New Jersey state budget permitting both the receipt and expenditures of these funds.
2. RCN shall provide verified proof to the Office of the customer service enhancements enacted to improve its responsiveness and overall customer service within thirty (30) days of the date of this Order, but in no event later than the closing date of any transfer of assets involving RCN's Central New Jersey cable television systems.
3. RCN shall issue an in-kind benefit of not less than \$1.2 million in the aggregate to its 81,000 New Jersey subscribers in the form of a one-time per subscriber refund of approximately \$15.00 each in the next available billing cycle following the Board's acceptance of the Consent Agreement, but in no event later than sixty (60) days of the date of this Order. RCN shall inform its subscribers of the reason of the refunds, and denominate all such refunds as "BPU Refund" on subscribers' bills.
4. RCN shall, within ten (10) days of the payment of the refunds to subscribers notify the Board and the Office, in writing, of the date(s) said refunds were paid and the amounts refunded. RCN shall further, within ten (10) days of effectuating the entire refund to its subscribers, provide verified proof to the Board and the Office that the refunds have been completed and provide a final accounting of said refunds.
5. Should RCN's New Jersey cable systems, or any part thereof, merge and/or migrate to another system, its ownership or control be otherwise sold or transferred to another entity, before completion of any of the terms, conditions and requirements of the Consent Agreement and this Order are fully satisfied, said terms conditions and requirements will be fully binding on RCN and any successor until all such provisions are satisfied.

6. The Board's acceptance of the Consent Agreement is for the purposes of this proceeding only, addresses only those specific issues, actions and timeframes addressed in the Consent Agreement and shall not be construed as limiting the Board's authority in any other matter affecting RCN, or its successors in any current or future matter.

DATED: February 13, 2003

BOARD OF PUBLIC UTILITIES
BY:

(signed)

JEANNE M. FOX
PRESIDENT

(signed)

FREDERICK F. BUTLER
COMMISSIONER

(signed)

JACK ALTER
COMMISSIONER

DISSENTING OPINION OF COMMISSIONER CONNIE O. HUGHES AS TO THE FUNDING PROVIDED TO THE DEPARTMENT OF EDUCATION.

I respectfully dissent from the majority ruling regarding the RCN payment of \$50,000.00 to the Department of Education, State of New Jersey, payable July 10, 2003 to support educational programs, consistent with appropriate language in the New Jersey state budget permitting both the receipt and expenditures of these funds.

As discussed at the Board meeting, it is my belief that if utility or cable television company funds are being allocated to any Executive Branch department, the programming and use of those funds should be dedicated to address utility or cable television company related educational programs only.

For the aforementioned reason, I cannot support the RCN payment being made to the Department of Education being distributed. With this exception noted, I support the remainder of the Board's ruling.

(signed)

CONNIE O. HUGHES
COMMISSIONER

ATTEST:

(signed)

KRISTI IZZO
SECRETARY

**IN THE MATTER OF AN INVESTIGATION INTO THE OPERATIONS
OF RCN OF NEW JERSEY**

CONSENT AGREEMENT

DOCKET NO. CX01070460

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